

ENTERED

January 06, 2016

David J. Bradley, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

AXON WELL INTERVENTION PRODUCTS, INC., §

Plaintiff, §

v. §

CIVIL ACTION H-15-1956


CLEVELAND GEAR COMPANY, INC., §

Defendant. §**ORDER**

Pending before this court is defendant Cleveland Gear Company, Inc.'s ("Cleveland") motion to dismiss. Dkt. 16. After considering the motion, response, reply, plaintiff Axon Well Intervention Products, Inc.'s ("Axon") complaint (Dkt. 1, Ex. 2), applicable law, and oral arguments, the court is of the opinion that the motion should be DENIED. In its motion to dismiss, Cleveland argues that Axon's complaint should be dismissed because it failed to file a certificate of merit with its original petition, as required by § 150.002 of the Texas Civil Practice and Remedies Code. Dkt. 16 at 6. Even assuming, without deciding, that the certificate of merit requirement under § 150.002 applies in this federal court case, Cleveland cannot prevail on its motion because the certificate of merit requirement applies only to actions for "damages arising out of the provision of professional services by a licensed or registered professional." Tex. Civ. Prac. & Rem. Code § 150.002 (West 2011). Here, however, Axon's complaint does not seek damages arising from Cleveland's provision of engineering services. All four of Axon's claims are based on the following assertion: under the parties' agreement, Cleveland was required to deliver a worm-gear set that met certain specifications (i.e., the capability of achieving 2500 horsepower), but Cleveland failed to

deliver a worm-gear set that met those specifications. Dkt. 1, Ex. 2 at 3-4. Axon does not allege (nor, apparently, does it intend to prove) that Cleveland's negligent or deficient engineering services caused Cleveland's failure to provide a worm-gear set that met those specifications. Therefore, Axon was not required to file a certificate of merit. Cleveland's motion to dismiss is DENIED.

Signed at Houston, Texas on January 6, 2016.



Gray H. Miller
United States District Judge